U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 0 8 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education science and math teacher for [redacted] Most recently, the petitioner taught at [redacted] Maryland, until his H-1B nonimmigrant status expired on July 31, 2011. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and statistics about the test performance of PGCPS students.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 13, 2012. In an accompanying statement, counsel stated that the petitioner seeks the waiver

> based on his expertise in the said field as evidenced by his **Masters of Arts in Teaching-Special Education**. Aside from this, [the petitioner's] mastery on teaching

> Special Education is established by the numerous awards and contests received and won by him, respectively. . . .
>
> Furthermore, what makes [the petitioner's] request for National Interest Waiver even more meritorious is his selfless commitment to further uplift his current teaching vocation at in Maryland, where he is well-loved by her [*sic*] superiors, peers and students alike; his six (6) years of professional H-1B engagement as a Special Education teacher, his numerous awards, recognitions, and the testimonials on his behalf comprise the totality of circumstance underpinning his very mission to serve America.

(Counsel's emphasis.) The petitioner's résumé and a transcript reproduced in the record indicate that he earned his master's degree at , Philippines, between July 2010 and March 2011. The petitioner was employed in Maryland during that same period.

A section of the record marked "Outstanding Contributions in the United States" includes certificates, reports, and other documents relating to student performance and the petitioner's participation in various programs. Some of the documents included:

- Results from the 2005-2006 Florida Comprehensive Assessment Tests, showing that nearly all of the petitioner's students at showed improvement.
- An electronic mail message from a science instructional coach at Teacher Leadership and Professional Development Office to the petitioner and eight other teachers, congratulating them on a 7.6 point increase in Maryland School Assessment (MSA) scores.
- 2010 Performance Report, showing overall improvement in MSA proficiency levels from 2009 to 2010, and indicating that the school met the 2010 Adequate Yearly Progress goals in every category, including special education.
- Summary reports from the 2011 MSAs at providing statistical results but not stating whether or not the school met the Adequate Yearly Progress goals in special education. The report does not indicate that the school met the Annual Measurable Objective (85.8% of students scoring at the Proficient or Advanced levels in Reading, 78.6% doing so in Math) for the year. The numbers in the Special Education category were among the lowest shown.

The petitioner did not submit evidence comparing his individual performance with other teachers, and none of the materials described above show that the petitioner's work has had significant impact outside of the schools where he has taught or will continue to do so in the future.

The petitioner documented his participation in an Exchange Visitor Program in Olongapo City, Philippines, on the subject of "Integrating Guided Reading in Science Using Target Reading Skills." A certificate in the record indicates that, by returning to the Philippines in 2008 to participate in this

program, the petitioner "satisfactorily conducted the Proposed Alternative to the Two-year Home – Country Physical Presence Requirement" (a reference to the petitioner's former status as a J-1 nonimmigrant exchange visitor). Before his initial travel to the United States, the petitioner had worked at various schools in Olongapo City. The record does not indicate the effect that this presentation had on education in the Philippines, or that the petitioner has engaged in similar activities in the United States that have yielded national (rather than local) benefits (such as introducing original, new teaching techniques that are then widely implemented).

A section of the record marked "Awards" included photographs and copies of various certificates. Examples include:

- A March 22, 2004 "Certification" from the [redacted], Olongapo City, stating that the petitioner "is rated **OUTSTANDING** as SPED [Special Education] teacher for the last five years and was the recipient of the following awards:
  1. Finalist, Outstanding SPED Teacher of the Philippines, Nov. 26, 2002.
  2. Regional Winner, Outstanding SPED Teacher, Oct. 2002
  3. Division Winner, Outstanding SPED Teacher, July 2002."
- Materials indicating that the petitioner was the advisor of a student on the second-place team at the 1999 Young Scientists Quiz, Manila, Philippines. He also served as an advisor in other years.
- Documents showing that the [redacted] was "Second Runner Up" in the "Non-Central Category" for "the regional evaluation on the Search for the Most Effective Public Elementary School in Mathematics and Science" in October 2004.

(Emphasis in original.) The record contains no evidence of similar accolades in the United States, where the petitioner taught for six years before filing the petition. Many of the awards reflect achievements by individual students or teams of students, for whom the petitioner served as an advisor. The petitioner did not establish the extent to which his efforts, rather than those of the students, determined the outcome of the awards. A significant exception is the "Outstanding SPED Teacher of the Philippines," which clearly centers on the teachers rather than their students. The petitioner, however, submitted no other information about the competition, such as the number of finalists or the criteria for divisional, regional or national honors. These factors are crucial when determining the significance of the awards. The AAO notes that, under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), institutional recognition of this kind can form part of a successful claim of exceptional ability, but other types of evidence would also be necessary. Aliens of exceptional ability, in turn, are normally subject to the job offer requirement at section 203(b)(2)(A) of the Act. If awards, by themselves, cannot suffice to show exceptional ability, then it stands to reason that they do not inherently establish eligibility for the added benefit of the waiver. Without evidence to show the importance of the award and how the petitioner received it, the award does not qualify him for the waiver.

The petitioner submitted copies of favorable evaluations, and numerous letters from administrators, teachers and former students, all attesting to the petitioner's skill and accomplishments as a teacher but none of them showing impact or influence on a national scale.

On June 25, 2012, the director issued a request for evidence (RFE), stating that the petitioner "must be able to demonstrate . . . a degree of influence on the field which distinguishes [the petitioner] from other Science/Mathematics Special Education Teachers with comparable academic or professional qualifications."

In response, counsel listed the awards submitted previously, and stated that the "awards and recognitions are difficult to ignore as solid evidence of [the petitioner's] competency to influence the improvement of Special Education with concentration in Science in the United States of America." By the time counsel made this claim, the petitioner had been teaching in the United States for six years – a span of time longer than the period (1999-2004) covered by the submitted awards – but the petition submitted no evidence that the petitioner had, in fact, "influence[d] the improvement of Special Education with concentration in Science in the United States of America." In the absence of such evidence, it is not persuasive to assert that, given the achievements in the petitioner's more distant past, he is bound to improve education in the United States eventually.

Counsel asserted that a waiver today will serve the needs of United States workers in the long run, because the petitioner will educate students who, themselves, will eventually become United States workers who are protected by labor certification. That protection, however, extends to United States workers who are already teachers now, despite counsel's repeated attempts to claim that teachers, unlike other United States professionals, should not receive that benefit. Counsel seems, at times, to imply that labor certification would require [redacted] to hire the least qualified applicant, which is not an accurate portrayal of the process. Counsel acknowledged that the majority of teachers hold master's degrees, in which case recruitment efforts would not be limited to teachers who hold only bachelor's degrees. Likewise, counsel cited a study indicating that "92 percent" of special education teachers are "fully certified for their main teaching assignment." Rather than recognize that this statistic shows that the overwhelming majority of special education teachers hold such certification, counsel cast it in a negative light by observing that 92 percent is slightly lower than the 95 percent certification figure for "general educators." This three percent difference does not establish, imply or demonstrate that the petitioner, as an individual, meets the *NYSDOT* guidelines to qualify for a national interest waiver of the statutory job offer requirement.

Counsel claimed that the labor certification process poses a "dilemma" for the petitioner because he possesses qualifications above the bare minimum required for the job he seeks, and therefore "the United States Department of Labor would . . . most likely recommend denial of the application" for labor certification. Labor certification is not limited to workers whose qualifications exactly match the minimum qualifications for a given job. Furthermore, the waiver must serve the national interest. Counsel's unsupported and speculative claim that the petitioner "most likely" could not receive an approved labor certification does not establish or imply that a waiver would serve the national interest.

Counsel stated that "unquantifiable factors that zero in on 'passion'" distinguish the petitioner from qualified United States workers. This unprovable assertion attempts to sidestep, rather than meet, the "national scope" prong of the *NYSDOT* national interest test. The director did not assert that the petitioner is unqualified to work as a teacher for Rather, the petitioner has sought an additional immigration benefit (the national interest waiver) beyond the basic immigrant classification, and the director found that the petitioner had not submitted sufficient evidence to qualify for that additional benefit. Many of counsel's core assertions rest on the false premise that *NYSDOT* does not, or should not, apply to school teachers.

Counsel stated that the petitioner "has already been tested by the school and has proved his worth and effectiveness to the American special education students." By counsel's logic, the labor certification requirement should not apply to any foreign worker who is already working in the United States as a nonimmigrant, because the employers of all such workers have found them worthy of employment.

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard.

Counsel asserted that the waiver would "immediately meet both practically and theoretically the policy behind No Child Left Behind (NCLB) Law." Counsel later expands upon this line of reasoning on appeal, and the AAO will address the claims in that context.

Counsel stated that another teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted.

The petitioner submitted additional photographs, certificates, evaluations, test results and other materials reflecting or resulting from his teaching work. The petitioner stated that he "consistently raised scores of [his] Special Education/Regular students in Science from 2007-2012," but he did not show that his achievements in this regard set him apart from other teachers in his specialty. The record shows that federal guidelines call for improved proficiency figures every year. The petitioner identified the "interventions that helped [his] students attain significant gains in MSA" scores, but did not claim to have developed or significantly improved upon those interventions. Mastery of existing techniques already in use does not qualify the petitioner for the waiver. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. 221.

For the same reason, the petitioner's recitation of special qualifications and credentials does not, on its face, demonstrate eligibility for the waiver.

The petitioner made general assertions about special education teachers, stating for instance that they "are more effective in boosting mathematics achievement of students with disabilities" and "are likely to use a wider variety of teaching strategies." It does not follow that all special education teachers are, therefore, collectively exempt from the statutory job offer requirement.

Although counsel, in the accompanying statement, took pains to assert that the waiver claim is not based on a shortage of workers, the petitioner asserted that there "is a persistent critical/shortage [*sic*]" of special education teachers "in Maryland and the United States." The labor certification process exists to address such shortages. *See NYSDOT*, 22 I&N Dec. 218.

The director denied the petition on November 8, 2012, stating: "the attainment of a Master's degree or achieving the 'goals of No Child Left Behind' would not meet the national interest threshold." The director asserted that the petitioner must establish that he, individually, qualifies for the waiver; it cannot suffice for the petitioner to rely on general statements about his profession.

On appeal, counsel notes that Congress passed the No Child Left Behind Act three years after the issuance of NYSDOT as a precedent decision, and that therefore "[t]here is no longer vagueness or obscurity" on the question of whether "highly qualified teachers" serve the national interest. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the No Child Left Behind Act is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the No Child Left Behind Act indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver. In those remarks, President Bush stated: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the former "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel emphasizes the importance of closing the "achievement gap" and states that the petitioner plays a significant role in that endeavor. Counsel does not show that the petitioner has, in fact, made significant strides in that direction. Instead, counsel stated: "The fact that [redacted] did not meet its 2012 AMO target for Reading proficiency underscores the importance of having effective teachers of Reading/Language Arts in each classroom." Counsel, previously, had emphasized the subjects of science and mathematics. With [redacted] still underperforming after the petitioner had worked there for several years, counsel fails to explain why the petitioner is not only the ideal candidate for the position, but also eligible for a waiver of statutory provisions designed to allow qualified United States workers to compete for the position.

Counsel protests that the director held the petitioner to "ambiguous" requirements, which "is 'unduly burdensome' and in effect tantamount to requiring 'impossible evidence.'" With respect to the petitioner's influence on the field, counsel asserts that "nobody has control over who and how her works are accessed and used," and that *NYSDOT* relies on "hypotheticals." *NYSDOT* is a binding precedent decision that the director had no discretion to disregard. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation, superseding precedent decision or court decision that retracts, annuls or modifies *NYSDOT* in a manner relevant to this proceeding. (As noted previously, counsel cites the No Child Left Behind Act throughout the appellate brief, but never identifies any immigration-related clause in that statute, let alone any specific provision granting blanket waivers to "highly qualified teachers.") *NYSDOT* codifies USCIS's interpretation of the statute and regulations.

Counsel's different opinion regarding such interpretation has no weight in this proceeding, and neither compels nor authorizes any USCIS officer to disregard standing precedent. USCIS, including the AAO, has approved national interest waiver petitions under its provisions. With respect to the requirement that the petitioner show wider influence on the field, there are various ways in which such influence is possible, such as development of a widely used curriculum or educational strategy. When a teacher's work is confined to the classroom, however, the impact of that work is strictly local, as acknowledged in *NYSDOT* at 217 n.3.

Counsel asserts that the petitioner "has submitted overwhelming evidence" that "she [*sic*] has a past history of achievement with some degree of influence on the field of special education as a whole." Counsel then lists previously submitted exhibits, but does not explain how they show the petitioner's influence on the field of special education. The petitioner won some awards in the Philippines, but the petitioner has not submitted key information about those awards. Counsel also noted the petitioner's submission of witness letters. Those letters contained general praise for the petitioner's abilities and dedication as a teacher, but counsel does not quote any of the letters to show how the petitioner's work has had or will continue to have influence over the field as a whole.

Counsel contends that the "Texas Service Center should have presented its own comparable worker and deliberated its point in the decision, allowing the petitioner to rebut such a solid finding of fact." The burden of proof is on the petitioner to establish eligibility for the benefit sought; USCIS is not required to present an idealized example of an eligible alien for the petitioner to "rebut." *See* section 291 of the Act, 8 U.S.C. § 1361.

Counsel on appeal claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It remains that the petitioner's certificates do not facially establish eligibility for the national interest waiver. Counsel clearly considers these certificates to be significant, listing them again on appeal, while at the same time protesting that the petitioner need not explain how the certificates are significant. The director did not require the petitioner to establish exceptional ability in his field. Instead, the director observed that the petitioner's certificates resemble evidence of routine work product rather than evidence that the petitioner's work has had an influence beyond the school districts where he has worked.

Counsel asserts that there remains a pressing need for educational reform, because past efforts such as Teach For America have not produced satisfactory results. Counsel does not show that the petitioner's individual efforts, after several years in the United States, have stood out in this regard.

Counsel contends that, under the No Child Left Behind Act, schools that fail to meet specified benchmarks will lose federal funding and be "abolished," thereby putting the teachers out of work, and therefore United States teachers have an incentive to waive the labor certification requirement for highly qualified teachers. Counsel offers no real-life example of this situation ever happening, and it appears to be one of the "hypotheticals" that counsel condemned elsewhere in the same brief.

The bulk of the appellate brief consists of complaints about labor certification and *NYSDOT* and general statements about educational reform. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not yet exist. Counsel largely limits discussion of the petitioner's individual merits to a list of previous submissions, followed by the summary conclusion that the petitioner's eligibility should be obvious from the quality of the submitted evidence.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.